

(6) TRAINEE HANDOUT

TRAINING VSO LESSON SIX DEVELOPING NON-ORIGINAL CLAIMS

PREREQUISITE TRAINING

Prior to this training you should have completed the course of “Introduction to Development” and “Developing Original Live C&P Claims”.

PURPOSE OF LESSON

The purpose of this lesson is to present material so that at the completion of the lesson you will be able to:

- Identify new claims, reopened claims and a claim for increase and what action or evidence is required for each.
- Understand the concept of “new and material evidence” in the context of reopened claims.

TIME REQUIRED

1.25 hours

INSTRUCTIONAL METHOD

Participatory discussion and practical exercise.

MATERIALS/ TRAINING AIDS

Classroom or private area where a discussion may be held. Chairs and writing surfaces are required.

Large writing surface such as—easel pad, chalkboard, dry erase board, overhead projector, etc., with appropriate markers, or computer with projection equipment and PowerPoint software.

- The PowerPoint presentation for this lesson
- *The Student Handouts for this lesson.*

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DEVELOPING NON-ORIGINAL CLAIMS

In this lesson, we will be dealing with all claims filed after the original claim has been completed, other than an appeal. There is some common ground for these different claims, so before we discuss each type of claim, let's look at some definitions and common traits for these claims.

Duty to Assist Under VCAA: Any non-original claim that is originated by the veteran or his/her representative will be covered under VCAA, which was thoroughly discussed in the lesson on "Introduction to Development". The requirement for a "substantially complete application" does not translate well to non-original claims, and any communication that identifies the claimant and the benefit sought will meet the threshold for VCAA. We will not repeat those instructions here, and you can assume that any discussion of procedures here is done in accordance with VCAA.

Under VCAA, the law specifically provides that the claimant has one year from the date of our first letter advising them of their right to present evidence. If we decide the claim before that year has expired, and the claimant furnishes new evidence that bears on that decision, we will make a new decision. We will not start a new VCAA process or a new VCAA period unless there is a new issue.

Formal vs. Informal Claims: The regulations discuss formal claims in context of original claims. For this discussion, we will assume that an original, formal claim has been previously filed and completed. Any claim filed after the original claim has been adjudicated is, by regulation, an informal claim, but is accepted as a formal claim. Because this is confusing, we will avoid any discussion about "formal vs. informal" claims. Once an original claim has been made, the law does not require that any subsequent claims be made on a specific form or in a specific format. Nearly any communication from the claimant that is sufficient to identify the claimant and the benefit sought will suffice as a claim. Of course as a professional service officer, we expect much more from you, and we will discuss that in detail.

New Claims

Definition: A new claim is a claim for a benefit that has not been claimed previously. For example, your veteran is receiving service connected compensation for a left knee condition at ten percent disabling. He now wants to file a claim for service connection for prostate cancer, a condition he has not previously claimed. This is a new claim.

A new claim will include claims for any condition not previously made or for a benefit not previously claimed. If a veteran has previously filed a claim for service connected compensation and now files a claim for pension, this is a new claim. Claims for special monthly compensation or for ancillary benefits, such as an automobile allowance are new claims. Claims for a new service connected condition secondary to an existing service connected condition are new claims.

How to File the Claim: No specific form or format is required, but some forms may be helpful. If the veteran has never claimed pension before, we will need income, net worth and employment information (if he is over age 65, or in a nursing home, or declared disabled by Social Security, we do not need employment information, only income and net worth) and VA Form 21-527, *Income, Net Worth and Employment Statement* would be the best tool for the job. At a minimum, we need is the claimant's statement clearly defining what benefit they are claiming.

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What Evidence is Required: In cases where a new service connected condition is claimed, we will need evidence that the claimed condition exists. For example if the veteran is claiming service connection for prostate cancer, we will need some evidence that he actually has the condition; medical evidence of a diagnosis would be the best evidence to submit. In some cases, the veteran is qualified to observe that he/she has the disability, as in hearing loss. If the veteran is claiming pension because he/she is too disabled to work, we need at least some statement about the disability that prevents employment, or medical evidence of a disabling condition. If you have evidence or are aware of evidence that would validate and support the claim, send it. If the evidence comes from a private physician, send a completed 21-4142 for each doctor, hospital or clinic we need to contact. The VA will not order a VA examination until we have some evidence that shows the claimed condition exists, and if a claim is filed without such evidence, we will ask for it.

How the Claim Will Be Worked: Once the claim is received with sufficient supporting evidence to show the claimed condition exists, we will begin by sending the usual VCAA letter soliciting evidence. If we are aware that VA treatment records are available, we will request them. In almost every claim where a disability diagnosis or disability evaluation is required, a VA examination will be ordered. Once the VCAA period is cleared and all known evidence has been received, the decision will be made, and the claimant will be notified.

Reopened Claims

Definition: A reopened claim is a claim for a benefit that has previously been denied and that denial has become final. A “finally adjudicated claim” is defined as an application which has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of 1 year after the date of notice of an award or disallowance, or by denial on appellate review, whichever is the earlier (38 CFR 3.160d). A claim that has been finally adjudicated can only be reopened by presenting new and material evidence or if the final decision is found to be “clearly and unmistakably erroneous”. Therefore, to reopen a finally denied claim, new and material evidence must be presented. If the evidence is submitted during the one year response period provided under VCAA, the VA will reconsider a previously made decision on the basis of the new evidence. There is no requirement that evidence submitted during this period meet the requirement of “new and material”.

New evidence means existing evidence not previously submitted to agency decision-makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim (38 CFR 3.156a). There is extensive legal discussion about this concept, but in the simplest terms, the evidence should be evidence we have not previously considered and it should have a direct bearing on the reason for the prior denial. For example, if we previously denied a claim for service connection for a particular disability because there is no record of the condition in his/her SMR's, material evidence would be records of medical treatment while the veteran was on active duty that we have not seen before.

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How to File the Claim: As indicated above, new and material is required to reopen the claim, so if you have new and material evidence in hand, send it with the claim. The claim will not progress until there is evidence to consider, so if you file the claim without any evidence, the only thing that will happen is that the VA will send out the VCAA letter asking for evidence. If none is sent, the claim will be administratively denied at the end of the reply period.

What Evidence is Required: Since new and material evidence is required to reopen the claim, you would need to know what evidence has previously been considered. Usually this can be found on the last rating decision. Each rating must list what evidence was considered, and the narrative part of the rating will discuss how the evidence was considered. If the only evidence you are holding in your hand is something that was already considered in a prior rating, you do not have new and material evidence, and reopening on those grounds is futile. The evidence must address the reason the claim was previously denied, so if the reason for denial was that the veteran was not treated for the condition in service 10 years ago, and all you have is current treatment records, those records will not bear on the issue of incurrence, and are not likely material. On the other hand, if the claim was previously denied because there was no evidence of a current disability, and now you have evidence of a diagnosis, you have ample grounds to reopen the claim.

How the Claim Will Be Worked: When the claim is received, our first letter will be to advise the claimant that new and material evidence is required to reopen the previously denied claim, regardless whether or not new evidence was sent with the claim. At this point, we will not have analyzed whether the evidence is new and material. After the VCAA response period has expired, the claim will go to the rating team, and the RVSR will review it. They will go through a two-step analysis to determine whether the evidence is new and material. The evidence could be new, but not material, or neither. If they determine that the evidence is not new and material, the analysis will stop there and the claim will be disallowed.

If the evidence is new and material, a decision based on the merits of the evidence will be made. Most likely, if the RVSR determines that the evidence is new and material and there is a likelihood that the claim can be granted, they will defer the decision and develop for additional evidence, such as a VA examination. If the new and material evidence is sufficient to grant the benefits sought, the effective date will likely be the date the claim was filed with the VA. There are some instances, such as receipt of new SMR's that had not previously been considered, that would permit an earlier effective date.

We will cover appeals in another lesson, but we need to briefly discuss appeals of reopened claims. It is important to understand that consideration of reopened claims is a layered process. The first decision point is whether the evidence is new and material. If it is not, the merits or weight of the evidence will not be considered. The evidence may be compelling, but if it is not new and material, it will not be considered as determinative to the issue. Likewise, if the claim is denied for that reason, an appeal will only consider whether the evidence is sufficient to reopen the claim, not whether it is sufficient to overturn the prior denial. Appeals on this basis are rarely productive. You need to work with your client to get evidence that is sufficient to reopen the claim.

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Claims For Increase

Definition: A claim for increase is a claim for an increased evaluation of a condition that is already service connected. For example, if the veteran is currently evaluated at 10% for his service connected diabetes and the condition has become worse, he would file a claim for increase. These claim are often referred to as “reopened claims”, but they are not.

How to File the Claim: These are the easiest claims to file. The veteran’s statement that his/her disability has worsened is sufficient to file the claim. If you think the veteran may be eligible for individual unemployability, you should also specifically claim that as well.

What Evidence To Submit: No specific evidence is required beyond the veteran’s statement; the Court has stated that the veteran is competent to state that his/her condition has worsened. However, if you have or are aware of medical evidence of treatment that would help the veteran’s claim, you should send it, or make the VA aware of it. This is especially true if the veteran is receiving treatment at a VA facility as this may be the grounds for an earlier effective date of increased benefits.

How the Claim Will Be Worked: Upon receipt of the claim for increase, the VA will send out the usual VCAA letter inviting the veteran to submit evidence. A VA examination may be ordered either at this point or after the VCAA period has expired. If we are aware of treatment at a VA facility, we will obtain those records, and if the veteran has included a 21-4142 for private records, we attempt to get those. Once all the records and examination are in, or the VCAA period has expired, the case will go to the Rating Team. The RVSR will prepare the rating, or if indicated, defer for more evidence. The effective date of increase will be the date the claim was received in the VA in most cases. However, if the veteran was receiving treatment at a VA facility, and the VA treatment record shows a worsening of his/her condition, the increase will be retroactive to the date of treatment.

A word about individual unemployability claims; if, after the increased evaluation, the veteran meets the schedular evaluation for IU, (see 38 CFR 4.16) the RVSR will review the claim for possible entitlement. If the veteran is working or does not appear to unemployable, the rating will not consider IU, unless it was specifically claimed by the veteran. If the veteran is not working, and the disabilities meet the schedular level for IU, the RSVR will defer a decision and direct that the case be developed for potential entitlement. This means that the veteran will be sent VA Form 21-8940 *Veteran's Application for Increased Compensation Based on Unemployability* . If the veteran completes the form, returns it within one year, and the benefit is granted, it can be awarded retroactively to the effective date of increase, or the date he/she became unemployable, whichever is later. If your client is not working due to his/her service connected disabilities, you can include a completed VA Form 21-8940 with the claim. This will ensure that the issue of individual unemployability will be addressed. Remember that only service connected conditions may form the basis for an IU claim. Also remember that a claim for increase and a claim for total disability due to individual unemployability are two separate claims, and even though they may both be decided in the same rating, they are separate.

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The Service Officer's Role

Most of the claims you will file in behalf of your clients will fit into one of the above categories. It is a good routine to think about non-original claims in these terms and to remember what is required for each type of claim.

First, in your interview with the client, determine which of these types of claims you will be filing. At first, the terminology seems to be just verbiage, but the type of claim you are submitting determines what evidence you will need to make it successful.

After you know what type of claim you are filing, you can think in terms of what evidence you will be looking for. At this point, you will be asking the client what evidence he/she has for their claim. Obviously the hardest type of evidence to get will be new and material evidence to reopen a previously denied claim. Even though claims for increase do not require any evidence at all, if you have evidence that would help the claim, consider filing it.

In any claim filed through the assistance of a service officer, we expect that the claim will be clearly defined. Even if your client doesn't know exactly what they want, you can sift through their expectations and submit a cogent claim that the VA can understand. Too often we get claims from veterans that require us to ask for clarification about what they are claiming. Your assistance can avoid such confusion.

After you receive what is necessary to submit the claim, explain to the client what to expect next. All claims will get the usual VCAA letter. In nearly all claims for an increase, and in many claims for a new condition, a VA examination will be required. The client should be prepared for the examination and be able to explain their symptoms to the examiner. The hardest concept to explain will be the idea of "new and material" evidence.

Your client will receive several letters from the VA, the first being the VCAA letter advising them that they can submit evidence. Some clients will worry that the evidence you sent with the claim did not get to the VA. Usually the VCAA letter will mention what evidence is already on hand, but if not, you can call and ask or check MAP-D notes. Have your client call you if they get a letter they don't understand or if the letter requests they furnish some specific answer. Usually, when the VA asks for something specific, we believe that evidence may be determinative to the claim and failure to furnish it will likely result in a denial. If you can respond to these letters at the earliest possible time, it will help speed the claim toward resolution.